IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
March 20, 2001 Session

WRIGHT MEDICAL TECHNOLOGY, INC. v. ORTHOMATRIX, INC.

A Direct Appeal from the Circuit Court for Shelby County
No. 2872 CT The Honorable James F. Russell, Judge

No. W2000-02744-COA-R3-CV - May 17, 2001

Plaintiff filed a complaint against defendant to collect sums due pursuant to a contract. Defendant filed a motion to compel arbitration asserting that by virtue of a subsequently executed document, exclusive distribution and purchase agreement, arbitration is required because the documents form one contract. The trial court denied the motion for arbitration, and defendant has appealed pursuant to T.C.A. § 29-5-319. We affirm.

Tenn.R.App.P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

Earle J. Schwarz, Memphis, For Appellant, Orthomatrix, Inc.

George T. Lewis, III, Memphis, For Appellee, Wright Medical Technology, Inc.

OPINION

On June 1, 2000, Wright Medical Technology, Inc. ("Wright") filed a complaint for damages in the amount of $166,396.91 plus pre-judgment interest allegedly resulting from a breach of contract by OrthoMatrix, Inc. ("OrthoMatrix"). The complaint avers that on or about October 21, 1998, Wright and OrthoMatrix entered into an agreement entitled Asset Purchase Agreement, Exhibit A to the complaint, whereby Wright would sell and OrthoMatrix would purchase a business involving the manufacture and sale of products affiliated with bone fracture reduction and repair. The complaint further avers that on March 15, 1999, the parties entered into an Amendment to the Asset Purchase Agreement, Exhibit B to the complaint, whereby OrthoMatrix obligated itself to a "Minimum Purchase Obligation" in the amount of $3,038,950.00 and that OrthoMatrix was required by the Amendment to pay a distribution fee to Wright equal to 9.5% of the outstanding "Minimum Purchase Obligation," to be paid quarterly. The complaint alleges that the quarterly distribution fees for June 30, 1999, September 30, 1999, December 31, 1999, and March 31, 2000 had not been paid,

totaling $166,396.91, for which the complaint seeks judgment plus prejudgment interest on each of the installment payments from the time they were due.

In response to Wright's complaint, OrthoMatrix filed a motion to compel arbitration and dismiss litigation averring that Wright failed to attach to its complaint a copy of "Exclusive Distribution and Purchase Agreement," which OrthoMatrix asserts was contemplated in the parties' "Amendment to the Asset Purchase Agreement," and which provided for mandatory arbitration of disputes including disputes involving payment of distribution fees. OrthoMatrix avers that although the provision regarding the payment of distribution fees was included in the Amendment to the Asset Purchase Agreement, the Amendment anticipates the Distribution Agreement, and therefore the two documents must be read together. OrthoMatrix further avers that the determination of the scope of the arbitration clause contained in the Distribution Agreement is a question for an arbitrator to decide. Wright filed a response to OrthoMatrix's motion to compel arbitration which summarized the background of the case as follows:

> Wright Medical and OrthoMatrix, Inc. ("OrthoMatrix") entered into an Asset Purchase Agreement dated October 21, 1998. Pursuant to the Asset Purchase Agreement, OrthoMatrix was to purchase certain assets from Wright Medical. The transaction was scheduled to close on November 25, 1998. At the closing, OrthoMatrix was to pay to Wright Medial $1.2 million, plus the value of all merchantable medical trauma products inventory up to $2.8 million.
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> The transaction did not close at the designated time, and on March 15, 1999, the parties entered into an agreement designated Terms and Conditions of Amendments/Changes to Asset Purchase Agreement dated October 21, 1998, By and Among Wight Medical Technology and OrthoMatrix, Inc. ("Amendment"). Pursuant to the Amendment, the closing was rescheduled for March 23, 1999.
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> Under the Amendment, OrthoMatrix was no longer required to make all its payments at the closing but was permitted to make its payments over a two year period. At closing, OrthoMatrix was to tender a purchase order for $1.5 million payable by June 29, 1999. This $1.5 million purchase order would be credited against OrthoMatrix's Minimum Purchase Obligation of $2.8 million. The balance of the Minimum Purchase Obligation would be purchased during the two years following the closing date. In consideration for allowing OrthoMatrix to pay its obligation over time rather than at closing, as originally agreed, OrthoMatrix was to pay a distribution fee of 9.5% of the outstanding Minimum Purchase Obligation. The distribution fee was payable each quarter.

> The closing still did not occur on the revised closing date of March 23, 1999. The transaction eventually closed on April 23, 1999. At that time the parties entered into an Exclusive Distribution and Purchase Agreement. Under the Exclusive Distribution and Purchase Agreement ("Distribution Agreement"), OrthoMatrix was designated as Wright Medical's distributor of the products contemplated by the Asset Purchase Agreement. The Distribution Agreement set forth details as to the manner in which the relationship worked. No payment terms are mentioned in the Distribution Agreement. The circumstances surrounding the execution [of] these three agreements is set forth in the Affidavit of Jason P. Hood filed contemporaneously herewith and incorporated herein by reference.
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> Pursuant to the Amendment, OrthoMatrix was to pay its first quarterly distribution fee to Wright Medical on June 30, 1999. Four such payments have come due, and OrthoMatrix has failed to pay each and every one of the required quarterly distribution fee payments. Wright Medical has filed this lawsuit to recover the unpaid distribution fees. Wright Medical has pending a Motion for Summary Judgment. In response to Wright Medical's Complaint (and Motion for Summary Judgment), OrthoMatrix filed a Motion to Compel Arbitration and Dismiss Litigation ("Motion").

Wright asserts that, "Arbitration is not appropriate in this case because there is no arbitration provision which governs this particular dispute. OrthoMatrix's Motion should, therefore, be denied."

Following a hearing on OrthoMatrix's motion to compel arbitration, an order was entered denying the motion. In denying the motion, the trial court stated:

> From a review of the foregoing, the Court finds that the parties intended that the Asset Purchase Agreement, as amended, to be the primary contract between the parties and that the Exclusive Distribution Agreement was subordinate to the Asset Purchase Agreement, as amended. The Court finds that the distribution fee sued upon by Plaintiff arises under the Amendment to the Asset Purchase Agreement and that had the parties never entered into the Exclusive Distribution Agreement, the distribution fee which is sued upon would still exist as a contractual obligation of the Defendant. Although the Court expresses no opinion whatsoever with respect to whether Defendant is liable for the distribution fee sued upon, the Court is of the opinion that the Plaintiff never agreed to submit any

> dispute with respect to the Defendant's liability for the distribution fees to be submitted to arbitration.

OrthoMatrix has appealed, raising two issues as stated in its brief:

> I. Whether the Court erred in concluding that the scope of the arbitration clause in the Distribution Agreement was not broad enough to cover a dispute over the payment of distribution fees even though the arbitration clause extends to "all disputes arising in connection with" the Distribution Agreement?
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> II. Whether the Court erred in refusing to refer to arbitration, the dispute over the scope of the arbitration provision even though the arbitration clause provides that issues concerning the meaning of the Distribution Agreement should be decided by the arbitrator?

There are no disputed facts, and a resolution of the issues requires an interpretation of the documents involved. The interpretation of an unambiguous written agreement is a question of law for the court. ***Hamblen County v. City of Morristown***, 656 S.W.2d 331 (Tenn. 1983). In construing contracts, the court's overriding purpose is to ascertain the intention of the parties. ***Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.***, 521 S.W.2d 578 (Tenn. 1975), ***West v. Laminite Plastics Mfg. Co.***, 674 S.W.2d 310 (Tenn. Ct. App. 1984).

In construing contracts, the words expressing the parties' intentions should be given the usual, natural, and ordinary meaning. ***Ballard v. North American Life & Cas. Co.***, 667 S.W.2d 79 (Tenn. Ct. App. 1983). If there is no ambiguity, the court must interpret the contract as written, rather than according to the unexpressed intention of one of the parties. ***Sutton v. First Nat. of Crossville***, 620 S.W.2d 526 (Tenn. Ct. App. 1981). Courts do not make contracts for the parties but can only enforce the contract which the parties themselves have made. ***McKee v. Continental Ins. Co.***, 191 Tenn. 413, 234 S.W.2d 830, 22 ALR2d 980 (1950).

OrthoMatrix contends that the scope of the arbitration provision in the Distribution Agreement covers a dispute over the payment of distribution fees. OrthoMatrix asserts that the language of the arbitration clause requires that "[a]ll disputes arising in connection with this Agreement, including the interpretation of the Agreement," be submitted to arbitration. OrthoMatrix argues that because the arbitration clause, on its face, encompasses issues involving payment of distribution fees, arbitration should be compelled. Additionally, OrthoMatrix contends that the Amendment to the Asset Purchase Agreement, must be read together with or incorporated into the Distribution Agreement, and that a merger of the two documents was contemplated by the parties.

Wright asserts that the intent of the parties is what ultimately determines whether an arbitration provision requires arbitration of a dispute and that arbitration of a dispute can not be compelled absent an agreement to arbitrate. Wright further asserts that the terms of the Distribution

Agreement and the Asset Purchase Agreement make clear that the parties did not intend to arbitrate a dispute involving the payment of distribution fees, and that the scope of the arbitration provision in the Distribution Agreement can not be "stretched to include this lawsuit." Wright asserts there was no merger and the Distribution Agreement was not incorporated into the Asset Purchase Agreement, as amended.

In considering a motion to compel arbitration, the court must determine if there is an agreement to arbitrate. ***Estate of Wyatt***, No. 02A01-9706-PB-00132,94-10452, 1998 WL 477668 (Tenn. Ct. App. Aug. 17, 1998).

We must determine whether the parties agreed to arbitrate a dispute involving distribution fees. OrthoMatrix contends that the arbitration clause in the Exclusive Distribution and Purchase Agreement requires arbitration of the instant dispute concerning indebtedness for the quarterly distribution fees. This clause provides in pertinent part:

> F. Arbitration.
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> 1. All Disputes arising in connection with this Agreement, including the interpretation of the Agreement, shall be settled in Memphis, Tennessee, U.S.A., by one (1) Arbitrator who shall be selected by agreement of the parties from a panel of Arbitrators, residents of the United States provided by the American Arbitration Association ("AAA"), in accordance with the Commercial Arbitration Rules then in effect of the AAA.

Clearly, this clause applies only to disputes arising under the distribution agreement which is "the agreement" referred to. The parties' instant dispute arises under the express terms of the Amendment to the Asset Purchase Agreement entitled "Terms and Conditions of Amendments/Changes to Asset Purchase Agreement Dated October 21, 1998, By and Among Wright Medical Technology, Inc. and OrthoMatrix, Inc." The purpose of the Amendment is stated in that document as follows:

> The Asset Purchase by OrthoMatrix, Inc. ("OrthoMatrix") will exclude inventories, work-in-process, raw materials and inventory in inspection, as noted in Section 1.1.1(a) and Section 1.3.1(b), and in lieu of such purchase, OrthoMatrix will execute an Exclusive Distribution Agreement ("Agreement") with Wight Medical Technology, Inc. ("WMT") with the following summary provisions, terms and conditions:
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> * * *

> (3) OrthoMatrix will pay a distribution fee to WMT equal to 9.5% on the outstanding Minimum Purchase Obligation. That fee will fluctuate based upon WMT's base rate in its asset-based loan agreement. Distribution fee payments will be paid by OrthoMatrix on a quarterly basis.

According to the terms of the Amendment: "All other terms and provisions of the Asset Purchase Agreement will remain in effect." The Amendment to the Asset Purchase Agreement contains no reference to arbitration or the resolution of disputes arising under the Amendment. We therefore conclude that by the terms of the Amendment, the parties intended that the terms of the Asset Purchase Agreement should apply to disputes arising thereunder.

Although there are two sections in the Asset Purchase Agreement providing for section 1.7 under Article I, Purchase and Sale; and section 6.5 under Article VI, Indemnification, they have no application to the dispute in the instant case. Section 1.7 reads as follows:

> Dispute Resolution. Any dispute which may arise between Seller and Purchaser as to the Purchase Price Adjustment[1] shall be resolved in the following manner:
>
> If the Seller and Purchaser shall have failed to reach a written agreement with respect to the Final Dollar Amount of Inventory, the matter shall be referred to a mutually agreeable independent certified public accountant (the "Arbitrator"), which shall act as an arbitrator and shall issue its report as the Final Dollar Amount of Inventory determined pursuant to Section 1.5 within thirty (30) days after such dispute is referred to the Arbitrator. Each of the parties hereto shall bear all costs and expenses incurred by it in connection with such arbitration, except that the fees and expenses of the Arbitrator hereunder shall be borne equally by Seller and Purchaser. This provision for arbitration shall be specifically enforceable by the parties and the decision of the Arbitrator in accordance with the provisions hereof shall be final and binding and there shall be no right of appeal therefrom.

Section 6.5, under Article VI, Indemnification, states in pertinent part:

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[1] Section 1.6 of the Asset Purchase Agreement defines the Purchase Price Adjustment as follows: "As soon as practicable after the determination of the Final Dollar Amount of Inventory, the Purchase Price shall be adjusted on a dollar for dollar basis by the difference between the Preliminary Dollar Amount of Inventory and the Final Dollar Amount of Inventory. Provided, however, notwithstanding anything contained herein, the Purchase Price Adjustment in favor of Purchaser shall be limited to the amount by which $2.8 million exceeds the Final Dollar Amount of Inventory. Further, the Purchase Price Adjustment in favor of the Seller shall not result in the Final Dollar Amount of Inventory exceeding $2.8 Million…"

> Arbitration.
>
> (a) All disputes under this Article VI shall be settled by arbitration in Memphis, Tennessee, before a single arbitrator pursuant to the rules of the American Arbitration Association. Arbitration may be commenced at any time by any party hereto giving written notice to each other party to a dispute that such dispute has been referred to arbitration under this Section 6.5.....
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> (b) To the extent that arbitration may not be legally permitted hereunder and the parties to any dispute hereunder may not at the time of such dispute mutually agree to submit such dispute to arbitration any party may commence a civil action in a court of appropriate jurisdiction to solve disputes hereunder. Nothing contained in this Section 6.5 shall prevent the parties from settling any dispute by mutual agreement at any time.

Section 6.7 makes clear the limited scope of the "Arbitration" clause contained in Article VI, stating in pertinent part:

> Other Rights and Remedies not Affected. The indemnification rights of the parties under this Article VI are independent of and in addition to such rights and remedies as the parities may have at law or in equity or otherwise for any misrepresentation, breach of warranty or failure to fulfill an agreement or covenant hereunder on the part of any party hereto, including without limitation the right to seek specific performance, rescission or restitution, none of which rights or remedies shall be affected or diminished hereby.

The language of the two sections in the Asset Purchase Agreement which refer to arbitration are unambiguously limited in scope, and neither of the two arbitration clauses apply to the current dispute between the parties.

OrthoMatrix contends that the Asset Purchase Agreement, as amended and the Distribution Agreement were merged, and therefore the scope of the terms of the Distribution Agreement extend to this dispute. However, we believe to the contrary that by the terms of the Distribution Agreement, the arbitration clause contained therein does not extend to a term expressly addressed in the Asset Purchase Agreement, as amended. The plain language of the Distribution Agreement reveals that the parties intended that agreement and the Asset Purchase Agreement, as amended to remain separate; and in the case of a conflict of the terms of the two agreements, parties intended that the terms of the Distribution Agreement be subordinate to those contained in the Asset Purchase Agreement, as Amended.

We quote from section "4" under the heading "Handling and Acceptance of Orders" in the Distribution Agreement:

> Company agrees to accept, fill and ship the distributor's orders in a timely manner. Products delivered to Distributor may be rejected as non-conforming, out of spec, or non-merchantable and returned by Distributor, subject to the Purchase Agreement.

The phrase "subject to the Purchase Agreement" is a hand written interliniation by the parties. In addition, under the heading "Indemnity," the Distribution Agreement reads: "Indemnification by and between the parties shall be per the Purchase Agreement." Finally, within the Distribution Agreement, the "Entire Agreement" is defined as follows:

> This Agreement, and the Purchase Agreement, as amended contains (sic) the understanding between the Company and the Distributor, and any person or entity directly or indirectly affiliated with the Company, and the Distributor....

Again, the reference to the Purchase Agreement, as amended is an interliniation by the parties. The Distribution Agreement contains an addendum with additional general provisions, one of which reads:

> Conflicts. This Agreement is made between the parties in conjunction with an Asset Purchase Agreement between the parties dated October 21, 1998, as amended ("Purchase Agreement"). Any conflicts between this Agreement and the Purchase Agreement, as amended, and related agreements shall be resolved in favor of the Purchase Agreement, as amended, and related agreements.

Having reviewed the involved documents, we agree with the trial court in its finding that the parties' intention as expressed in the Distribution Agreement was that it remain separate from and subordinate to the Asset Purchase Agreement, as amended. References to "This Agreement" appear together with references to the Asset Purchase Agreement, as amended, plainly indicating two separate documents. Furthermore, references to the Asset Purchase Agreement, as amended, appear in two places as interliniations in the Distribution Agreement, indicating the intention of the parties that these two documents remain separate. The intentional segregation of these documents is emphasized by the additional term found in addendum to the Distribution Agreement which clearly distinguishes between "This Agreement" (the Distribution Agreement) and the Asset Purchase Agreement, as amended and expressly determines that conflicts in the terms of these agreements should be resolved in favor of the Purchase Agreement, as amended.

The designation that the documents be taken in conjunction as the entire agreement between

the parties does not change the fact that the documents remain separate and retain their own terms and conditions. "Conjunction" is defined as "the act of conjugating" from the Latin root "conjugare" to unite. Webster's New Collegiate Dictionary, 237 (1981). Taken with its plain meaning, the language does not indicate that the conjugation of these documents amounts to a merger, nor does it subject all disputes to the arbitration clause found in the Distribution Agreement. Therefore, we find that the language in the Distribution Agreement designating that "[a]ll disputes in connection with this agreement including the interpretation of this Agreement" are to be settled through arbitration, does not indicate that a dispute arising out of the terms of the Asset Purchase Agreement, as amended, should be submitted to arbitration.

As to whether the trial court erred in failing to refer the arbitrability of this matter to arbitration, we believe that it did not. T.C.A. § 29-5-303 (2000) entitled "Order for arbitration - Stay of arbitration proceeding- Effect of other proceedings involving issues subject to arbitration" provides in pertinent part:

> (a) On application of a party showing an agreement described in § 29-5-302, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, ***but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.***

(Emphasis added).

Even if this dispute fell under the terms of the Distribution Agreement, which we have determined to the contrary, the unambiguous terms of the Distribution Agreement under the heading "Arbitration" indicate otherwise, reading in part:

> 2. If either party, notwithstanding the foregoing, should attempt either to resolve any dispute arising in connection with this Agreement in a court of law or equity or to forestall, preempt or prevent arbitration of any such dispute by resort to the process of a court of law or equity, and such dispute is ultimately determined to be arbitrable by such court of law or equity, the arbitrators shall include in their awards an amount for the other party equal to all of that other party's cost, including legal fees, incurred in connection with such arbitrability determination.

Accordingly, we find that the trial court did not err in denying OrthoMatrix's motion to compel arbitration, nor did it overstep its jurisdictional limitations in deciding the issue of arbitrability. The order of the trial court is therefore affirmed. The case is remanded for further

proceedings as necessary. Costs of this appeal are assessed against the Appellant, OrthoMatrix, Inc. and its sureties.

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W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.